



## Insurance, Banking & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Jemena Asset Management (3) Pty Ltd v Coinvest Ltd** - High Court of Australia decision - *Workplace Relations Act 1996* (Cth) - *Construction Industry Long Service Leave Act 1997* (Vic) - s109 *Commonwealth of Australia Constitution Act* - appeal dismissed (I, C)

**Blacktown Workers' Club Ltd v O'Shannessy** - *Smoke-Free Environment Act 2000* (NSW) - *Smoke-Free Environment Regulation 2007* (NSW) - statutory interpretation - prosecution - appeal allowed (I, B, C)

**Mungis (No 2) Pty Ltd v Still** - Personal injuries - occupier's liability - appeal & cross-appeal dismissed (I)

**Nair-Smith v Perisher Blue Pty Ltd** - s58(2) *Civil Procedure Act 2005* (NSW) - defendant's application dismissed (I)

**Director of Housing v Sudi** - *Residential Tenancies Act 1997* (Vic) - s38(1) *Charter of Human Rights & Responsibilities Act 2006* (Vic) - appeal allowed (I)

**King v Amaca Pty Ltd** - Personal injuries - defendant's application for direction that trial proceed without a jury refused (I)



**Pavlinovich Bulk Transport Pty Ltd v Shire of Kalamunda** - *Planning & Development Act 2005* (WA) - appeal against conviction & sentence (C)

**Kidd v Resource Management and Planning Appeal Tribunal (No 2)** - Costs (C)

**Hi-Lite Electrical Led v Wolseley UK Ltd** – United Kingdom decision - fire in hair salon - causation (I, C)

**FHR European Ventures LLP & Ors v Mankarious & Ors** - United Kingdom decision - contracts - agent's commission - agent's disclosure obligations (B)

## Summaries with links (5 minute read)

**Thursday 8 September 2011**

### **Jemena Asset Management (3) Pty Ltd v Coinvest Ltd [2011] HCA 33**

High Court of Australia

French CJ, Gummow, Heydon, Crennan, Kiefel & Bell JJ

*Workplace Relations Act 1996* (Cth) - *Construction Industry Long Service Leave Act 1997* (Vic) - s109 *Commonwealth of Australia Constitution Act* - portable long service leave benefits for workers in continuous service within the construction industry - no real inconsistency between state & federal legislation - appeal dismissed - State Act not invalid by reference to s109 of the Constitution - "alter, impair or detract from", "cover the field", "direct inconsistency", "indirect inconsistency."

[Jemena Asset Management](#) (I, C)

[Jemena Asset Management](#) - decision 18 December 2009: see 'Benchmark' C & IBC Wednesday 23 December 2009 - no inconsistency - appeal dismissed.

[Jemena Asset Management](#) - decision 9 April, 2009: see 'Benchmark' C & IBC Thursday 16 April 2009 - federal industrial instruments regulating long service leave -whether industrial instruments cover the field - no inconsistency.

**Blacktown Workers' Club Ltd v O'Shannessy [2011] NSWCA 265**

Court of Appeal of New South Wales

Basten JA; Handley & Sackville AJJA

*Smoke-Free Environment Act 2000 (NSW) - Smoke-Free Environment Regulation 2007 (NSW) - statutory interpretation - prosecution - enclosed public places - "walls"; "includes"; "directly"; "opens directly to the outside"; "gaps in walls" - appeal allowed - orders made in Common Law Division of Supreme Court set aside; prosecutor's appeal from judgment & orders made by magistrate dismissed.*

[Blacktown Workers' Club](#) (I, B, C)

[Leanne O'Shannessy](#) - decision 14 October 2010: see 'Benchmark' Tuesday 19 October 2010 - appeal from Local Court - prosecution of first defendant under s8(1) - whether the gaming area within Blacktown Workers that was designated for smokers contravened (a) s8 of & (b) the Guidelines prescribed in clause 6 Smoke-free Environment Regulation 2007 (since amended) - "wall" - "opens directly to the outside" - appeal upheld.

**Mungis (No 2) Pty Ltd v Still [2011] NSWCA 261**

Court of Appeal of New South Wales

Basten & Macfarlan JJA & Sackville AJA

Personal injuries - occupier's liability - respondent, employee of a labour hire company, in work-related accident at appellant's factory - contract worker injured when compartment door of plastic thermoforming machine sprang open under pressure - in District Court, primary judge found breach of duty of care - cross-appeal in which respondent contesting primary judge's finding of twenty-five percent contributory negligence - appeal & cross-appeal dismissed.

[Mungis](#) (I)

**Nair-Smith v Perisher Blue Pty Ltd [2011] NSWSC 878**

Supreme Court of New South Wales

Fullerton J

Personal injuries - plaintiff claiming damages for injury boarding chair lift at Perisher ski fields - defendant operator of chair lift - defendant's application primarily for order dismissing plaintiff's claim for damages for loss of earnings & diminution of her earning capacity or, in the alternative, an order that proceedings be stayed pending provision of adequate particulars & full discovery; if primary relief refused, orders sought preventing supplementing evidence served to date - orders sought preventing reliance at trial upon reports of forensic accountants - s58(2) *Civil Procedure Act 2005 (NSW)* - defendant's application dismissed.

[Nair-Smith](#) (I)

**Director of Housing v Sudi [2011] VSCA 266**

Court of Appeal of Victoria

Warren CJ, Maxwell P & Weinberg JA

*Residential Tenancies Act 1997* (Vic) - s38(1) *Charter of Human Rights & Responsibilities Act 2006* (Vic) - powers of Victorian Civil & Administrative Tribunal when exercising original jurisdiction - collateral review - appeal from Tribunal decision dismissing two applications by Director of Housing under s344 *Residential Tenancies Act 1997* for an order for possession of premises occupied by respondent & his son - appeal allowed - matter to be remitted - comprehensive review of text & case law from United Kingdom & Australia.

[Director of Housing](#) (I)

[Director of Housing](#) - decision 31 March 2010 Victoria Civil & Administrative Tribunal

**King v Amaca Pty Ltd [2011] VSC 433**

Supreme Court of Victoria

Kyrou J

Personal injuries - claim for damages for contraction of mesothelioma as a result of exposure to asbestos dust & fibres - plaintiff's writ had specified judge & jury - defendant's application for a direction that the trial proceed without a jury refused.

[King](#) (I)

**Pavlinovich Bulk Transport Pty Ltd v Shire of Kalamunda [2011] WASC 234**

Supreme Court of Western Australia

Commissioner Sleight

*Planning & Development Act 2005* (WA) - town planning scheme - appeal against conviction & sentence - validity of restrictions on use of land for commercial vehicle parking - appellant contending restriction on parking of commercial vehicles on special rural zoned land outside the scope of the Act - *Interpretation Act 1984* (WA) - appeal dismissed.

[Pavlinovich](#) (C)

**Kidd v Resource Management and Planning Appeal Tribunal (No 2) [2011] TASSC 46**

Supreme Court of Tasmania

Porter J

Costs - for decision 2 August 2011, see 'Benchmark' C & IBC Tuesday 2 August 2011 & link below.

[Kidd](#) (C)

[Kidd](#) - decision 29 July 2011 *Historic Cultural Heritage Act 1995* (Tas) - two buildings in Hobart - decisions permitting their demolition - appeal allowed.



## From the United Kingdom ...

### **Hi-Lite Electrical Led v Wolseley UK Ltd [2011] EWHC 2153 (TCC)**

High Court of England & Wales, Technology & Construction Court  
Ramsey J

Torts - causation - remoteness - apportionment - proceedings arising out of a fire which occurred in a hair salon & health spa at Birmingham - claimant electrical contractor who had installed pump - defendant operated stores which sold pipes, valves, fittings & associated plumbing products - defendant brought third party proceedings against company which manufactured the pumps & supplied the pump to defendant - in other proceedings, claimant had been found liable to salon operator in contract for losses which salon suffered as a result of the fire - in these proceedings, claimant seeking declaration that defendant liable for fire & that defendant should indemnify claimant for any sums for which claimant liable to salon operator - expert evidence - fatigue failure of float switch cable - at par 182 of judgment: claimant had not proved on balance of probabilities that cause of the fire was manufacturing defect because of excessive heat being applied when the float switch was moulded onto the cable, & there was no other likely cause which would give rise to defendant being liable under *Sale of Goods Act 1979* (United Kingdom)

[Hi-Lite Electrical](#) (I, C)

### **FHR European Ventures LLP & Ors v Mankarious & Ors [2011] EWHC 2308 (Ch)**

High Court of England & Wales, Chancery Division  
Simon J

Contracts - sale of a long leasehold interest in Monte Carlo Grand Hotel - purchaser first claimant - exclusive brokerage agreement - agents - fiduciary duties - exception of informed consent - agent's commission - agent's disclosure obligations - claimants claiming €10 million as undisclosed commission received by defendants, contending defendants in breach of their duty as fiduciary agents not to profit from their position or to put themselves in a position where their interest & duty were in conflict - defendants contending they were entitled to retain the commission the payment of which was known to claimants; defendants counterclaiming for sums due from the claimants in respect of work done on their behalf - whether Bank of Scotland was conferred with actual or implied authority to be recipient of disclosure on behalf of co-principals - His Honour's conclusions from par 99 of judgment.

[FHR European Ventures](#) (B)

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